MOHD HAKEEM HANIFF & ANOR v. DATUK BANDAR KUALA LUMPUR & ORS AND OTHER APPEALS

HIGH COURT MALAYA, KUALA LUMPUR
LEONG WAI HONG JC
[APPEAL NOS: WA-12BNCVC-56-04-2023,
WA-12BNCVC-60-04-2023 & WA-12BNCVC-63-04-2023]
19 APRIL 2024

Abstract – *When enough facts have been pleaded in a statement of claim, the testimonies in court and in the documents adduced at trial, factual errors in the particulars stated in a statement of claim, such as the failure to prove precisely the name of a road where the accident occurred, or the cause of accident, is not fatal. It ought not result in a claim being dismissed because of a technical defect.*

TORT: *Negligence – Claim for – Road accident – Statement of claim – Alleged factual errors regarding location of accident and cause of accident – Whether errors found in particulars of statement of claim fatal – Whether parties bound by pleadings*

TORT: *Negligence – Claim for – Road accident – Road accident caused by manhole – Whether local authority has statutory duty to keep road in good condition – Whether local authority's duty to ensure third parties covered manhole properly – Whether local authority liable – Whether quantum awarded within range*

CIVIL PROCEDURE: *Statement of claim – Particulars – Whether errors found in particulars of statement of claim fatal – Whether parties bound by pleadings*

CIVIL PROCEDURE: *Third party indemnity claim – Road accident – Negligence – Whether accident happened in area under care and maintenance of third party – Whether due to manhole owned by third party – Whether indemnity claims allowed*

This judgment dealt with three appeals and a cross-appeal arising from a tragic motorcycle accident. The main appeal was by the two plaintiffs at the Sessions Court, who were seriously injured on 19 September 2019 while riding a motorcycle at about 11.10pm which hit 'a large hole/uneven road level.' At the Sessions Court, the plaintiffs sued Datuk Bandar Kuala Lumpur/defendant ('DBKL') for negligence. DBKL, in turn, brought a third party indemnity claim against Sistem Penyuraian Trafik KL Barat Holdings Sdn Bhd ('Sprint') as a third party. The basis stated by DBKL was that the accident was due to a manhole cover belonging to Time Dotcom Bhd ('Time Dotcom') located between Jalan Beringin and Damansara Puchong Highway, and that the highway was under the care of Sprint. Sprint, in turn, brought a third party indemnity claim against Time Dotcom as a second third party

on the grounds that Time Dotcom's manhole had caused the accident. The plaintiffs' suit against DBKL was dismissed after a full trial. Nonetheless, the Sessions Court proceeded to assess the quantum (based on the 100% liability on the basis the claim of the plaintiffs was allowed) as required under the guidelines for the purposes of an appeal. The plaintiffs filed an appeal ('Appeal 56') on liability and quantum but subsequently abandoned the appeal on quantum. DBKL, in turn, filed a cross-appeal in encl. 6 on part of the general damages and part of the special damages awarded to the plaintiffs. DBKL's indemnity claim against Sprint was also dismissed by the Sessions Court. DBKL filed an appeal ('Appeal 60'). Sprint's indemnity claim against Time Dotcom was also dismissed by the Sessions Court. Sprint filed an appeal ('Appeal 63'). The sole ground cited by the Sessions Court to dismiss the plaintiff's suit were two factual errors in the statement of claim. The Sessions Court said the statement of claim had pleaded the accident happened at Jalan Johar, Kuala Lumpur from the direction of Bangsar Shopping Mall towards Cheras whereas in court, the first plaintiff testified it happened at Jalan Beringin. The Sessions Court also said the statement of claim had pleaded the accident happened due to 'a large hole/ uneven road level' and not a manhole. Therefore, the acute issue was whether errors in the particulars stated in a statement of claim were fatal under the principle that parties were bound by their pleadings.

Held (ordering accordingly):

(1) On the location of the accident, the maintenance staff and sole witness from DBKL, SD1, testified the accident happened between Jalan Beringin and Damansara Link Highway in an area under the care of Sprint. This constituted an admission of law. There was also an email from Litrak, the holding company of Sprint, stating 'the accident location was at KM 80.4 Eastbound, Damansara Link. It was therefore confirmed that the accident location was under Sprint jurisdiction.' This constituted an admission of law. On the cause of the accident, SD1 testified that the accident happened because the first plaintiff's motorcycle hit a 'manhole' belonging to Time Dotcom. This constituted an admission of law. DBKL had brought a third party indemnity claim against Sprint as a third party. The basis stated by DBKL was that the accident was due to a manhole cover belonging to Time Dotcom located between Jalan Beringin and Damansara-Puchong Highway, and that the highway was under the care of Sprint. Therefore, DBKL's assertion that 'DBKL does not know whether the incident occurred and cannot know whether the incident had occurred because DBKL was not present at the incident alleged on 19 September 2019' flew in the face of evidence. (paras 20-29)

(2) A Litrak Sprint operation log book stated that at 23:36, the staff arrived at an accident location at KM 80.4 Eastbound involving a motorcyclist whereby a Malay man and his pillion rider, a Malay lady, were seriously injured. An ambulance came. The plaintiffs' pleading on the location of the accident was supported by the evidence adduced. The plaintiffs' failure to prove precisely the name of the road where the accident occurred was not fatal. The fact that the plaintiffs pleaded the accident was due to a large hole and not a manhole that DBKL admitted caused the accident was also not fatal. DBKL was not misled. Enough facts had been pleaded in the statement of claim, the testimonies in court and in the documents adduced at trial. The fact an accident happened involving the plaintiffs were admitted in DBKL's site investigation report, the adjusters report, email from Litrak and Litrak Sprint operation log book. The general locality of the accident was not in dispute as Jalan Johar and Jalan Beringin were also side by side. DBKL's witness had also identified the manhole cover as a cause of the accident. In the absence of any witness from Sprint and Time Dotcom, the plaintiffs' and DBKL's witness' testimonies were not rebutted. (paras 35-42)

(3) The Sessions Court was wrong to dismiss the suit of the plaintiffs on the grounds that the accident location and cause of accident were wrongly pleaded in the statement of claim. The Sessions Court should have proceeded to decide on the merits of the suit. DBKL was not protected by statutory immunity under s. 7 of the Government Proceedings Act 1956. They have a statutory duty to the plaintiffs to keep the road in good condition. They could not escape liability by delegating it to a third party like Sprint and Time Dotcom. DBKL had not performed that duty. They did not see to it that the third parties like Sprint and Time Dotcom covered the manhole properly or put up warning signs or cones near the manhole to warn road users of the manhole. DBKL was consequently liable to the plaintiffs. This court allowed the appeal by the plaintiffs against DBKL in Appeal 56. (paras 54-58)

(4) As for the cross-appeal by DBKL on quantum, as long as the awards were within the range, an appellate court should not interfere. The amounts awarded were not extremely high so as to justify appellate intervention. Thus, the cross-appeal in Appeal 56 was dismissed. (paras 60 & 63)

(5) As the DBKL's witness SD1, the adjuster's report to the insurance company and an email from Litrak the holding company of Sprint confirmed that the accident happened on 19 September 2019 at the Damansara Link Highway, evidence adduced showed that the accident happened in an area delegated by DBKL to the care and maintenance of Sprint. Since Sprint did not call any witnesses to rebut DBKL's indemnity claim, Appeal 60 was allowed. (paras 64-68)

(6) The investigating officer, SP1, testified to the existence of a manhole at the accident location, and DBKL's witness, SD1, testified the accident happened because the first plaintiff's motorcycle hit a 'manhole' belonging to Time Dotcom. Evidence adduced therefore showed that the accident happened due to a manhole owned by Time Dotcom and since Time Dotcom opted to submit no case to answer and did not call any witness to rebut the facts and to rebut Sprint's indemnity claim, the appeal by Sprint in Appeal 63 was allowed with costs. (paras 71-73)

Case(s) referred to:

Ang Koon Kau & Anor v. Lau Piang Ngong [1985] 1 CLJ 31; [1985] CLJ (Rep) 24 FC ***(refd)***

Cheng Bee Teik & Ors v. Peter Selvaraj & Anor [2005] 2 CLJ 839 CA ***(refd)***

Datuk Bandar Dewan Bandaraya Kuala Lumpur v. Ong Kok Peng & Anor [1993] 3 CLJ 205 SC ***(refd)***

Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***

KEP Mohamed Ali v. KEP Mohamed Ismail [1980] CLJU 169; [1980] 1 LNS 169 FC ***(refd)***

New Ever Korea Travel Co Ltd v. Ever Korea Service (M) Sdn Bhd [2023] 2 CLJ 625 HC ***(refd)***

Playing Cards (Malaysia) Sdn Bhd v. China Mutual Navigation Co Ltd [1980] CLJU 57; [1980] 1 LNS 57 FC ***(refd)***

Raymond Cheah Choon Sing v. Jurutera Daerah, Jabatan Kerja Raya Seberang Perai Tengah & Ors [2017] 9 CLJ 543 CA ***(refd)***

Sajid Dilwarkhan v. Ketua Pengarah Jabatan Kerja Raya & Ors [2020] CLJU 2188; [2020] 1 LNS 2188 HC ***(refd)***

Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***

Soh Hoo Hong v. Thor Beng Keat & Ors [2024] CLJU 231; [2024] 1 LNS 231 HC ***(refd)***

Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim [2015] 2 CLJ 1037 FC ***(refd)***

Topaiwah v. Salleh [1968] CLJU 161; [1968] 1 LNS 161 FC ***(refd)***

Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd [2010] 1 CLJ 484 CA ***(refd)***

Yui Chin Song & Ors v. Lee Ming Chai & Ors [2019] 7 CLJ 740 FC ***(refd)***

Legislation referred to:

Government Proceedings Act 1956, s. 7

(Appeal No: WA-12BNCVC-56-04-2023)
For the appellants - Patricia Ponnudurai; M/s Sree Harry & Co
For the 1st respondent - Dalveena Korotana; M/s Arnold Andrew & Co
For the 2nd respondent - K Vibalananthan; M/s Vib & Co
For the 3rd respondent - Faliq Faizal; M/s Murali B Pillai & Assocs

(Appeal No: WA-12BNCVC-60-04-2023)
For the appellant - Dalveena Korotana; M/s Arnold Andrew & Co
For the 1st respondent - K Vibalananthan; M/s Vib & Co
For the 2nd & 3rd respondents - Patricia Ponnudurai; M/s Sree Harry & Co

(Appeal No: WA-12BNCVC-63-04-2023)
For the appellant - K Vibalananthan; M/s Vib & Co
For the respondent - Faliq Faizal; M/s Murali B Pillai & Assocs

Reported by Suhainah Wahiduddin

JUDGMENT

Leong Wai Hong JC:

Introduction

[1] This judgment deals with three appeals and a cross-appeal arising from a tragic motorcycle accident. The important issue that arises is whether errors in the particulars stated in a statement of claim are fatal under the principle that parties are bound by their pleadings. Are all errors or only certain categories of errors fatal? Will it result in the claim being dismissed because of this technical defect?

[2] The main appeal is by the two plaintiffs at the Sessions Court below, *ie*, Mohd Hakeem bin Haniff, a gym instructor, age 34 and his fiancé, Nurul Shafinaz binti Abdul Rashid, age 26 at the time of the accident.

[3] They were seriously injured on 19 September 2019 while riding a motorcycle at about 11.10pm, which hit, and I quote, "satu lubang yang besar/rata yang tidak rata aras jalan tersebut.", unquote.

(See statement of claim para. 3 encl. 3 p. 41).

[4] The Malay phrase "satu lubang yang besar/rata yang tidak rata aras jalan" translated into English is "a large hole/uneven road level".

[5] At the Sessions Court, the plaintiffs, on 23 October 2020, have sued Datuk Bandar Kuala Lumpur/defendant ("DBKL") for negligence.

Third-Party Indemnity Claims

[6] DBKL, in turn on 23 March 2022, brought a third party indemnity claim against Sistem Penyuraian Trafik KL Barat Holdings Sdn Bhd ("Sprint") as a third party. The basis stated by DBKL was that the accident was due to a manhole cover belonging to Time Dotcom Berhad ("Time Dotcom") located between Jalan Beringin and Damansara Puchong Highway, and that the highway was under the care of Sprint. (See third party notice encl. 3 pp. 58 to 62).

[7] Sprint, in turn, brought a third party indemnity claim against Time Dotcom as second third party on the grounds that Time Dotcom's manhole had caused the accident. (See third party notice encl. 3 pp. 87 to 91).

Trial At Sessions Court

[8] At the trial, the two plaintiffs testified as SP2 and SP3. The police investigating officer/SP1 and Mohamed Fauzi, a maintenance staff from DBKL/SD1, also testified. Sprint opted not to call any witnesses. Time Dotcom also did not call any witnesses and opted to submit a no case to answer. (See grounds of judgment Sessions Court at [7] and [8]).

[9] The plaintiffs' suit against DBKL was dismissed on 30 March 2023 after a full trial. Nonetheless, the Sessions Court proceeded to assess the quantum, (based on 100% liability on the basis the claim of the plaintiffs is allowed), as required under the guidelines for the purposes of an appeal.

[10] The plaintiffs filed an appeal in WA-12BNCvC-56-04-2023 ("Appeal 56") to me on liability and quantum but subsequently abandoned the appeal on quantum. DBKL, in turn, filed a cross-appeal in encl. 6 on part of the general damages and part of the special damages awarded to the plaintiffs.

[11] DBKL's indemnity claim against Sprint was also dismissed by the Sessions Court. (See grounds of judgment Sessions Court at [9]). DBKL filed an appeal in WA-12BNCvC-60-04-2023 ("Appeal 60") to me.

[12] Sprint's indemnity claim against Time Dotcom was also dismissed by the Sessions Court. (See grounds of judgment Sessions Court at [9]). Sprint filed an appeal in WA-12BNCvC-63-04-2023 ("Appeal 63") to me.

Appeals To Me

[13] I heard all three appeals and the cross-appeal together on 17 October 2023, 31 October 2023, 15 February 2024 and 1 March 2024. I delivered my decision on 1 March 2024.

[14] DBKL and Time Dotcom have, on 1 April 2024, applied for leave to appeal to the Court of Appeal against my decision. These are my grounds of decision. I start with Appeal 56.

Reasoning Of The Sessions Court

[15] The sole ground cited by the Sessions Court to dismiss the plaintiffs' suit was two factual errors in the statement of claim. (See grounds of judgment Sessions Court at [33]).

[16] The Sessions Court said that the statement of claim at para. 3 (see appeal record Part A p. 41) had pleaded that the accident happened at Jalan Johar, Kuala Lumpur, from the direction of Bangsar Shopping Mall towards Cheras, whereas, in court, the first plaintiff testified it happened at Jalan Beringin.

[17] The Sessions Court also said that the statement of claim at para. 3 had pleaded the accident happened due to "a large hole/uneven road level" and not a manhole. (See grounds of judgment Sessions Court at (31 to 33)).

Issue

[18] Therefore, the acute issue before me is whether errors in the particulars stated in a statement of claim are fatal under the principle that parties are bound by their pleadings.

DBKL's Contention

[19] DBKL submits that the errors are fatal, contending that parties are bound by their pleadings. DBKL relies on *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944 at p. 960, which held:

> [29] *It is a cardinal rule in civil litigation that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded* (see: *State Government of Perak v. Muniandy* [1985] 1 LNS 117; [1986] 1 MLJ 490; and *Anuar Mat Amin v. Abdullah Mohd Zain* [1989] 1 LNS 74; [1989] 3 MLJ 313). In *Blay v. Pollard & Morris* [1930] 1 KB 628, Scrutton LJ ruled that: "Cases must be decided on the issues on the record; and *if it is desired to raise other issues there must be pleaded on the record by amendment.*"
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> [30] The Supreme Court in *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239; [1991] 1 MLJ 428, had also emphasised the importance of pleadings and rules that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal (see also *Ambank (M) Bhd v. Luqman Kamil Mohammed Don* [2012] 3 CLJ 551; [2012] MLJU 56 GC). (emphasis added)

My Analysis

On The Location Of The Accident

[20] The pleadings, evidence produced and the testimonies at the Sessions Court show the following facts:

(i) the statement of claim at para. 3 had pleaded that the accident happened at Jalan Johar, Kuala Lumpur from the direction of Bangsar Shopping Mall towards Cheras. (See encl. 3 appeal record Part A p. 41).

(ii) the first plaintiff/PW2 testified that the accident happened at Jalan Beringin. (See encl. 4 witness statement Q and A 3 appeal record Part B p. 120).

(iii) the second plaintiff/PW3 testified that the accident happened at Jalan Johar. (See encl. 4 witness statement Q and A 5 appeal record Part B p. 123).

(iv) DBKL's sole witness, Mohamed Fauzi, a maintenance staff from DBKL/SD1, testified that the accident happened between Jalan Beringin and Damansara Link Highway in an area under the care of Sprint. This constitutes an admission in law.

(See encl. 4 witness statement Q and A 8 appeal record Part B p. 129). (See also undated DBKL site investigation report signed by Mohamed Fauzi and verified by one Muhammad Anwar bin Othman from DBKL at encl. 5 appeal record Part C p. 375).

(v) the adjuster's report dated 28 June 2022 by Sedgwick Malaysia Sdn Bhd to the insurance company, Axa Affin General Insurance Berhad, for the claim lodged by the insured/first third party/Sprint also confirmed that the accident happened on 19 September 2019 along Jalan Johar KL (KM 80.4 Eastbound, Damansara Link) which is under the insured's/first third party's/Sprint's jurisdiction. This constitutes an admission in law.

(See encl. 5 pp. 341 to 366, at p. 344 last paragraph and p. 345 third paragraph).

(vi) there is also an email from Litrak, the holding company of Sprint, dated 21 April 2022, stating "the accident location is at KM 80.4 Eastbound, Damansara Link. It is therefore confirmed that the accident location is under SPRINT jurisdiction." This constitutes an admission in law.

(See email from Litrak dated 21 April 2022 at p. 348 encl. 5 appeal record Part C).

(vii) a Litrak Sprint operation log book for 19 September 2019 also stated that at 23:36 the staff arrived at an accident location at 80.4 Eastbound involving a motorcyclist, whereby a Malay man and his pillion rider, a Malay lady, were seriously injured. An ambulance came. This constitutes an admission in law.

(See pp. 363 to 364 in encl. 5 appeal record Part C).

On The Cause Of The Accident

[21] The pleadings, evidence produced and the testimonies at the Sessions Court show the following facts:

(i) the statement of claim at para. 3 had pleaded the accident happened due to "a large hole/uneven road level". (See encl. 3 appeal record Part A p. 41).

(ii) the first plaintiff/SP2 testified that the accident happened because his motorcycle hit a large hole. (See encl. 4 witness statement Q and A 3 and 4 appeal record Part B p. 120).

(iii) the second plaintiff/SP3 testified the accident happened because her fiancé/the first plaintiff's motorcycle hit a large hole. (See encl. 4 witness statement Q and A 5 and 6 appeal record Part B p. 120).

(iv) DBKL's sole witness, Mohamed Fauzi, a maintenance staff from DBKL/SD1, testified that the accident happened because the first plaintiff's motorcycle hit a 'manhole' belonging to Time Dotcom. This constitutes an admission in law.

(See encl. 4 witness statement Q and A 8 appeal record Part B p. 129). (See also undated DBKL site investigation report signed by Mohamed Fauzi and verified by one Muhammad Anwar bin Othman from DBKL at encl. 5 appeal record Part C pp. 375 and 376).

(v) the investigating officer, Sarjan Che Anuar, testified as SP1. Although he has prepared a witness statement, all counsel agreed it is not put in the appeal record. SP1 testimony is in notes of proceeding encl. 4 pp. 134 to 187. He testified to the existence of a manhole at the accident location. (See encl. 4 pp. 140 to 141). The Rajah Kasar at encl. 5 p. 317 states "lokasi kejadian (jalan berlubang)". SP1 testified that the manhole cover was used to cover a hole for workers to go down and come out when doing work underground. (See encl. 4 p. 141).

(vi) counsel for DBKL has contended that SP1/investigating officer only went to the accident site on 4 January 2021 when the accident was about a year and four months earlier on 19 September 2019. (See encl. 4 notes of proceeding pp. 142 to 143). So, can his rajah kasar be accurate? The answer is yes, as the location of the manhole has not shifted. It is still there. In any event, no rebuttal evidence was adduced by DBKL, Sprint and Time Dotcom.

[22] Thus, the fact that there was an accident and the location of the accident is admitted by both DBKL and by the first third party/Sprint and that the road is under the maintenance of the first third party/Sprint.

[23] DBKL's sole witness Mohamed Fauzi, a maintenance staff from DBKL/SD1, testified the accident happened because the first plaintiff's motorcycle hit a 'manhole' belonging to Time Dotcom. This constitutes an admission in law.

(See encl. 4 witness statement Q and A 8 appeal record Part B p. 129). (See also undated DBKL site investigation report signed by Mohamed Fauzi and verified by one Muhammad Anwar bin Othman from DBKL at encl. 5 appeal record Part C pp. 375 and 376).

[24] Both plaintiffs also testified that the accident happened on 19 September 2019 at about 11.10pm at night and that the road was darkly lit.

(See PW2 witness statement Q and A 3 and 5 encl. 4 appeal record Part B pp. 120 to 121).

(See PW3 witness statement Q and A 1 to 7 encl. 4 appeal record Part B pp. 123 to 124).

[25] During oral submissions before me, Ms. Dalveena Korotana, counsel for DBKL asserted forcefully "DBKL do not know whether the incident occurred and cannot know whether the incident had occurred because DBKL was not present at the incident alleged by the appellants on 19 September 2019."

[26] I find this submission incredulous in the face of the documentary evidence I have taken the trouble to set out above. It behoves on all counsel to present their case in a manner that reflects their duty to the court to assist the court to arrive at a fair and correct decision.

[27] Her own witness, Mohamed Fauzi, a maintenance staff from DBKL/SD1, testified that that the accident happened because the first plaintiff's motorcycle hit a 'manhole' belonging to Time Dotcom. (See encl. 4 witness statement Q and A 8 appeal record Part B p. 129). (See also undated DBKL site investigation report signed by Mohamed Fauzi and verified by one Muhammad Anwar bin Othman from DBKL at encl. 5 appeal record Part C pp. 375 and 376). The testimony of Mohamed Fauzi constitutes an admission in law.

[28] Further, DBKL has brought a third party indemnity claim against Sprint as a third party. The basis stated by DBKL was that the accident was due to a manhole cover belonging to Time Dotcom located between Jalan Beringin and Damansara Puchong Highway, and that the highway was under the care of Sprint. (See third party notice encl. 3 pp. 58 to 62).

[29] Therefore, DBKL's counsel's assertion that "DBKL do not know whether the incident occurred and cannot know whether the incident had occurred because DBKL was not present at the incident alleged by the appellants on 19 September 2019" flies in the face of the evidence.

Are Errors Of Facts Pleaded In A Statement Of Claim Fatal?

[30] I now consider the two pleading defects cited by the Sessions Court as the reason to dismiss the claim.

Alleged Error In The Location Of The Accident

[31] The statement of claim at para. 3 had pleaded that the accident happened at Jalan Johar, Kuala Lumpur from the direction of Bangsar Shopping Mall towards Cheras. The first plaintiff testified that the accident happened at Jalan Beringin. The second plaintiff testified that the accident happened at Jalan Johar.

[32] DBKL's sole witness, Mohamed Fauzi, testified that the accident happened between Jalan Beringin and Damansara Link Highway in an area under the care of Sprint.

[33] The adjuster's report by Sedgwick Malaysia Sdn Bhd confirmed that the accident happened along Jalan Johar KL (KM 80.4 Eastbound, Damansara Link), which is under Sprint's jurisdiction.

[34] An email from Litrak, the holding company of Sprint, stated "the accident location is at KM 80.4 Eastbound, Damansara Link. It is therefore confirmed that the accident location is under SPRINT jurisdiction."

[35] A Litrak Sprint operation log book stated that at 23:36 the staff arrived at an accident location at KM 80.4 Eastbound involving a motorcyclist whereby a Malay man and his pillion rider, a Malay lady, were seriously injured. An ambulance came.

[36] From the above, it can be seen that the plaintiffs' pleading on the location of the accident is supported by the evidence adduced.

Alleged Error In Cause Of Accident

[37] The plaintiffs pleaded that the accident happened as the motorcycle hit "a large hole/uneven road level".

[38] DBKL's sole witness, Mohamed Fauzi, testified that the accident happened because the first plaintiff's motorcycle hit a 'manhole' belonging to Time Dotcom.

My Analysis

[39] To my mind, the plaintiffs' failure to prove precisely the name of the road where the accident occurred is not fatal. (Assuming there is a failure which I have earlier held is not the case). The fact that the plaintiffs pleaded that the accident was due to a large hole and not a manhole that DBKL admitted caused the accident is also not fatal.

[40] The defendant DBKL is not misled. Enough facts have been pleaded in the statement of claim, the testimonies in court and in the documents adduced at trial. The fact that an accident happened involving the plaintiffs is admitted in DBKL's site investigation report, the adjusters report, an email from Litrak and Litrak Sprint operation log book. The fact an accident has happened are also confirmed by the investigating officer, Sarjan Che Anuar, SP1 and DBKL's sole witness, Mohamed Fauzi.

[41] The general locality of the accident is not in dispute. Jalan Johar and Jalan Beringin are also side by side. See testimony of DBKL's witness, Mohamed Fauzi/SD1, in encl. 4 notes of proceeding at p. 274.

[42] DBKL is not misled when defending this claim. DBKL's witness, Mohamed Fauzi, has identified the manhole cover as a cause of the accident. In the absence of any witness from Sprint and Time Dotcom, the plaintiffs' and DBKL's witness' testimonies are not rebutted.

The Consequences Of Imprecise Pleadings And Evidence In Court Not Supporting Allegation In Pleadings

[43] The law on this issue can be seen in *Malaysian Civil Procedure 2021* vol. 1 Sweet & Maxwell at 18/7/10/5 and 18/10/3.

[44] The leading case in Malaysia on the consequences of imprecise pleadings is the Federal Court decision in *Ang Koon Kau & Anor v. Lau Piang Ngong* [1985] 1 CLJ 31; [1985] CLJ (Rep) 24; [1984] 2 MLJ 277 which surveyed Privy Council, English and Malaysian decisions on the issue before delivering judgment.

[45] The following principles can be distilled from the judgment of the Federal Court in *Ang Koon Kau & Anor v. Lau Piang Ngong* [1985] 1 CLJ 31; [1985] CLJ (Rep) 24; [1984] 2 MLJ 277:

(i) where the evidence at the trial establishes facts different from that pleaded by the plaintiffs which are not just a variation, modification or development of what has been alleged but which constitute a radical departure, the action will be dismissed. The courts should give their decisions in strict accordance with the pleadings.

(ii) where the evidence at the trial establishes facts, which are just a variation, modification or development of what has been pleaded and which do not constitute a radical departure, the court will proceed to decide on the merits of the issues. This is because the other side is not being taken by surprise. One of the objects of modern pleadings is to prevent surprise. (See also *KEP Mohamed Ali v. KEP Mohamed Ismail* [1980] CLJU 169; [1980] 1 LNS 169; [1981] 2 MLJ 10, per Raja Azlan Shah CJ (Malaya) (as he then was) and *Playing Cards (Malaysia) Sdn Bhd v. China Mutual Navigation Co Ltd* [1980] CLJU 57; [1980] 1 LNS 57; [1980] 2 MLJ 182 per Abdoolcader J).

[46] To illustrate how a court should decide the consequences of imprecise pleadings, it is useful to examine the facts and decision in *Ang Koon Kau & Anor v. Lau Piang Ngong* [1985] 1 CLJ 31; [1985] CLJ (Rep) 24; [1984] 2 MLJ 277.

[47] The facts are as follows. The plaintiff was travelling on a motorcycle behind a motor lorry-*cum*-trailer driven by the defendant. At a bend, the lorry-*cum*-trailer was involved in an accident with an oncoming motor lorry. The plaintiff stopped his motorcycle but the oncoming lorry which had collided with the trailer hit him and oil palm fruits from the lorry fell over him, causing him injuries. All these he narrated in a police report that he lodged.

[48] In his statement of claim, the plaintiff had alleged that the trailer of the lorry had become disconnected and then collided with his motorcycle and the other lorry. In other words, he claimed that it was the trailer and not the other lorry which had collided with him.

[49] In his evidence-in-chief, the plaintiff confirmed the account given in his police report. In particular, he repeated that the trailer had snapped off before the collision between the tractor and the on-coming lorry. The judge found in favour of the plaintiff. The defendants appealed.

[50] The main question was whether, since the statement of claim alleged that it was the trailer which collided with the plaintiff's (respondent's) motorcycle and since no evidence was given in court to support this allegation, the plaintiff/respondent could succeed in the claim.

[51] Wan Suleiman FJ (delivering the judgment of the court) ruled in favour of the plaintiff and said: A

> *The main question* in the court below and again before us *is whether, since paragraph 3 of the Statement of Claim alleged that it was the trailer which collided with the plaintiff's motor cycle and since no evidence was given in court to support this allegation, the plaintiff/respondent can succeed in his claim.* B
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> …
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> It has not escaped our notice that the circumstances in *Menah*'s case are quite different from the present one. In both her statement of claim and repeatedly in evidence the appellant (Menah) stated that she alighted from a bicycle on which she was a passenger and was standing on the grass verge when the car, travelling on its wrong side of the road had knocked her down. The allegation had been denied by the respondent who averred that the bicycle had come out of a side road and across the path of the motor car. The trial judge did not consider her evidence reliable and found for the respondents, the only issue being whether the respondents were solely liable or not. C D
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> The appellant (Menah) then appealed against that very finding of fact. It was in these circumstances that Ong CJ … had said:
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> > I think it is necessary in this case to emphasize once again that the Courts should give their decisions in strict accordance with the pleadings. E
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> This Court distinguished *Menah*'s case in the later decision of *Siti Aishah bte Ibrahim v. Goh Cheng Hwai* [1982] 2 MLJ 124. In *Siti Aishah*'s case, the appellant pleaded in her statement of claim that she was walking on her proper side of the road, but in her evidence she said instead that she was crossing the road. This was in accord with her police report. In his defence the respondent said that she was indeed crossing the road. F
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> *The situation therein was therefore somewhat similar to that in the present appeal, for as was found in the judgment, the defendant was not misled, prejudiced or embarrassed or in any way taken by surprise.* The *Esso Petroleum* decision, upon which the appellant relied so heavily was also distinguished. The House of Lords held there that "Every allegation in the statement of claim was rightly decided by the trial judge in a sense adverse to the foreshore owners, who had made no allegation of unseaworthiness, the shipowners could not be held responsible because they did not negative a possible case which was not alleged against them in the pleadings nor made against them in the course of the trial." G H
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> It was not without good reason this Court in *Siti Aishah* gave special emphasis to that part of the judgment of Earl Jowitt, as a thorough scrutiny of the main body of that judgment would reveal. *Evidence given at the trial can therefore in appropriate circumstances overcome defects in the pleadings where the net result of such evidence is to prevent the other side from being taken by surprise.* I

The same consideration was again the basis of the decision in *KEP Mohamed Ali v. KEP Mohamed Ismail* [1981] 2 MLJ 10 where, although the statement of claim was statute-barred on April 11, 1974 there had been an acknowledgment of the debt in 1976. Although the acknowledgment was not pleaded in the statement of claim or the reply, this Court held that the case has been satisfactorily presented and developed in the proceedings before the High Court and that there was therefore sufficient evidence on record from which a decision to that effect could be arrived at.

In delivering judgment of this Court, Raja Azlan Shah CJ (Malaya) (as he then was) said:

> *As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.*

This case was cited with approval in the recent Privy Council decision in *OCBC Limited v. Philip Wee Kee Puan @ Wee Kee Phuan* [1984] 2 MLJ 1.

In yet another decision of this Court cited by Encik Subra Naicker, *Playing Cards (Malaysia) Sdn Bhd v. China Mutual Navigation Co Ltd* [1980] 2 MLJ 182, *the pleading was likewise imprecise but each party knew the case presented by the other, it was held that justice required that the substantive issues between the parties should nevertheless be considered.*

The learned trial judge made a lucid analysis, if we may say with respect, of certain English authorities which dealt with the scope of Order 18 rule 7, which is substantially similar to our Order 18 rule 7, commencing with *Waghorn v. George Wimpey & Co Ltd* [1969] 1 WLR 1764 as authority for the proposition that *where the evidence at the trial establishes facts different from that pleaded by the plaintiffs as constituting negligence which are not just a variation, modification or development of what has been alleged but which constitute a radical departure, the action will be dismissed.*

This same test was again applied by Lord Guest in *John G Stein & Co Ltd v. O'Hanlon* [1965] AC 890 909 who said:

> The question is whether the case upon which the respondent succeeded was covered by the pleadings. I have no doubt that the respondent failed to establish the case of a longstanding over-hang some 30 feet from the corner. But in the way in which the evidence came out this became immaterial when the accident was proved to have taken place at about the corner … *Although this finding was to some extent a variation or modification of the respondent's case on record, it was based upon the same ground of fault and it related to the facts as found by the Lord Ordinary upon evidence properly before him. There was not, in my view, such a radical departure from the case averred on record as would justify the House in absolving the appellants from liability.*

> The Judge then went on to examine the salient features of the present appeal. He noted that the way in which the defence was conducted showed that *the appellants were aware of the contents of the police report made by the plaintiff at an early stage, and that therefore it did not come as a surprise.* (emphasis added)

[52] Similarly, in *Playing Cards (Malaysia) Sdn Bhd v. China Mutual Navigation Co Ltd* [1980] CLJU 57; [1980] 1 LNS 57; [1980] 2 MLJ 182 per Abdoolcader J, on the pleadings the appellant's claim was for non-delivery of the goods and the claim as pleaded could not succeed as the goods were in fact delivered.

[53] Nonetheless, the Federal Court considered the appeal on the basis that the appellant's claim was in effect for delay in the delivery of the good because "it was well within the knowledge of the respondent that the goods had in fact been delivered in June 1974 by another ship and not as originally scheduled and that evidence was adduced at the trial was on these lines, **we do not think that the respondent was taken by surprise** and unable to meet the appellant's case or was unaware of the nature of the claim advanced by the appellant." (emphasis added)

[54] Applying the principles set out in the Federal Court decisions in *Ang Koon Kau & Anor v. Lau Piang Ngong* [1985] 1 CLJ 31; [1985] CLJ (Rep) 24; [1984] 2 MLJ 277 and in *Playing Cards (Malaysia) Sdn Bhd v. China Mutual Navigation Co Ltd* [1980] CLJU 57; [1980] 1 LNS 57; [1980] 2 MLJ 182, per Abdoolcader J, I therefore hold that the Sessions Court was wrong to dismiss the suit of the plaintiffs on the grounds that the accident location and cause of accident were wrongly pleaded in the statement of claim.

[55] The Sessions Court should have proceeded to decide on the merits of the suit.

[56] DBKL is not protected by statutory immunity under s. 7 of the Government Proceedings Act 1956. They have a statutory duty to the plaintiffs to keep the road in good condition. They cannot escape liability by delegating it to a third party like Sprint and Time Dotcom. DBKL has not performed that duty. They did not see to it that the third parties like Sprint and Time Dotcom covered the manhole properly or put up warning signs or cones near the manhole to warn road users of the manhole. DBKL is consequently liable to the plaintiffs.

(See *Sajid Dilwarkhan v. Ketua Pengarah Jabatan Kerja Raya & Ors* [2020] CLJU 2188; [2020] 1 LNS 2188; [2020] MLJU 2324, per SM Komathy Suppiah J, *Raymond Cheah Choon Sing v. Jurutera Daerah, Jabatan Kerja Raya Seberang Perai Tengah & Ors* [2017] 9 CLJ 543; [2018] 1 MLJ 362, per Vernon Ong JCA and *Datuk Bandar Dewan Bandaraya Kuala Lumpur v. Ong Kok Peng & Anor* [1993] 3 CLJ 205; [1993] 2 MLJ 234, per Peh Swee Chin SCJ).

[57] The Sessions Court's decision therefore cannot be supported as the Sessions Court had, with respect, failed to consider the facts and admissions which I have set out above and appellate intervention is warranted. (See *Sivalingam v. Periasamy* [1996]4 CLJ 545 CA).

[58] I would therefore allow the appeal by the plaintiffs against DBKL in Appeal 56 with costs.

Cross-appeal In Enclosure 6 By DBKL On Quantum

[59] The plaintiffs accept the quantum awarded by the Sessions Court (see grounds of judgment encl. 7). DBKL disagrees and appeals against part of the general and part of the special damages awarded by the Sessions Court. The items appealed against can be seen in the notice of cross-appeal in encl. 6. The items appealed are:

The first plaintiff general damages

(i) open fracture midshaft left femur Gustillo Grade 2: RM45,000;

(ii) closed fracture midshaft right femur: RM45,000;

(iii) multiple scars: RM20,000; and

(iv) pain and suffering for removal of proximal locking screws and implants: RM10,000.

The first plaintiff special damages

(i) costs of removal proximal locking screws: RM3,334 (1/3 of RM10,000); and

(ii) costs of removal of implants: RM4,000 (1/3 x RM12,000).

The second plaintiff general damages

(i) right zygomatic arch fracture (medially displaced): RM18,000;

(ii) right fronto-zygomatic fracture: RM15,000;

(iii) right orbital floor fracture: RM10,000;

(iv) deviated nasal septum: RM2,000; and

(v) paraesthesia lateral to the right side of nose, right cheek, and upper lip: RM3,000.

The second plaintiff special damages

(i) costs of augmentation of the right zygomatic prominence: RM5,000 (1/3 x RM15,000);

(ii) costs of septorhinoplasty to improve the nasal septum: RM2,334 (1/3 x RM7,000); and

(iii) removal of two bone plates: RM2,500 (1/3 x RM7,500).

The Law On Appellate Intervention On Quantum Awarded By The Lower Court

[60] In the appeal before me, in DBKL's written submissions encl. 13, DBKL has used the same cases and arguments cited before the Sessions Court. I am of the view that as long as the awards are within the range, an appellate court should not interfere. (See *Topaiwah v. Salleh* [1968] CLJU 161; [1968] 1 LNS 161; [1968] 1 MLJ 284 and *Cheng Bee Teik & Ors v. Peter Selvaraj & Anor* [2005] 2 CLJ 839; [2005] 4 MLJ 301).

[61] In *Cheng Bee Teik & Ors v. Peter Selvaraj & Ano*r [2005] 2 CLJ 839; [2005] 4 MLJ 301, the Court of Appeal said:

> it is an established approach for a court exercising appellate jurisdiction to adopt *that in an appeal on quantum, unless it can be shown that the award is extremely inconsistent with the trend or that the award was made on some misapprehension of facts or on some erroneous assumption of law or fact, the appellate court should not interfere.* (emphasis added)

[62] The Federal Court in *Topaiwah v. Salleh* [1968] CLJU 161; [1968] 1 LNS 161; [1968] 1 MLJ 284 held:

> The Federal Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that *the judge acted on some wrong principle of law,* or *that the amount awarded was so extremely high or so very small as to make it entirely erroneous estimate of the damages to which the Plaintiff is entitled.* (emphasis added)

[63] Counsel for DBKL has not convinced me that the amounts awarded were so extremely high so as to justify appellate intervention. I would therefore dismiss the cross-appeal in Appeal 56 by DBKL against the plaintiffs with costs.

Appeal 60

[64] DBKL's sole witness, Mohamed Fauzi, a maintenance staff from DBKL/SD1, testified that the accident happened between Jalan Beringin and Damansara Link Highway in an area under the care of Sprint.

(See encl. 4 witness statement Q and A 8 appeal record Part B p. 129). (See also undated DBKL site investigation report signed by Mohamed Fauzi and verified by one Muhammad Anwar bin Othman from DBKL at encl. 5 appeal record Part C p. 375).

[65] The adjuster's report dated 28 June 2022 by Sedgwick Malaysia Sdn Bhd to the insurance company Axa Affin General Insurance Berhad for the claim lodged by Sprint also confirmed that the accident happened on 19 September 2019 along Jalan Johar KL (KM 80.4 Eastbound, Damansara Link) which is under Sprint's jurisdiction.

(See encl. 5 pp. 341 to 366, at 344 last paragraph and p. 345 third paragraph).

[66] There is also an email from Litrak, the holding company of Sprint, dated 21 April 2022, stating "the accident location is at KM 80.4 Eastbound, Damansara Link. It is therefore confirmed that the accident location is under SPRINT jurisdiction." This constitutes an admission in law.

(See email from Litrak dated 21 April 2022 at p. 348 encl. 5 appeal record Part C).

[67] A Litrak Sprint operation log book for 19 September 2019 also stated that at 23:36, the staff arrived at an accident location at KM 80.4 Eastbound involving a motorcyclist whereby a Malay man and his pillion rider, a Malay lady, were seriously injured. An ambulance came. This constitutes an admission in law.

(See pp. 363 to 364 in encl. 5 appeal record Part C).

[68] The evidence adduced therefore shows that the accident happened in an area delegated by DBKL to the care and maintenance of Sprint. Since Sprint did not call any witnesses to rebut DBKL's indemnity claim and the evidence I have set out above, the appeal is allowed with costs.

Appeal 63

[69] Time Dotcom opted to submit, a no case to answer and did not call any witnesses to rebut Sprint's indemnity claim.

The Law On No Case To Answer

[70] From the decided cases, which I had reviewed previously in *New Ever Korea Travel Co Ltd v. Ever Korea Service (M) Sdn Bhd* [2023] 2 CLJ 625, the principles applicable when a defendant submits 'no case to answer' are as follows:

(i) at the close of the plaintiffs' case, a defendant can opt not to call any witness for the defence but instead make a submission of 'no case to answer'.

(ii) where the defence submits 'no case to answer', the trial judge must put the defence counsel to his election, namely, that if he elects not to call evidence, he will stand or fall on his submissions.

(iii) the judge should refuse to make a ruling on a submission of 'no case to answer' unless the defence makes it clear that he does not intend to call any witness for the defence.

(iv) for the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true. (See *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509, per Gopal Sri Ram JCA at p. 528(d)).

(v) adverse inference can be drawn against the defendant for failing to call any witnesses should the circumstances appropriately call for such an adverse inference. (See *Jaafar Shaari*, per Peh Swee Chin FCJ at p. 519(e)).

(vi) however, even if the plaintiffs' evidence is presumed to be true and adverse inference is drawn, the burden of proof, at all times, is borne by the plaintiff on the balance of probabilities to establish his case against the defendant. It is for the plaintiff to prove his case and satisfy the court that his claim is well-founded before the court can grant judgment on his claim. The fact that the defendant has led no evidence or called no witnesses does not absolve the plaintiff from discharging his burden in law. (See *Jaafar Shaari*, per Peh Swee Chin FCJ at p. 519, *Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim* [2015] 2 CLJ 1037; [2015] 3 MLJ 609, per Ramly Ali FCJ, *Yui Chin Song & Ors v. Lee Ming Chai & Ors* [2019] 7 CLJ 740; [2019] 6 MLJ 417, per Ramly Ali FCJ, *Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd* [2010] 1 CLJ 484; [2011] 4 MLJ 805, per Abdul Malik Ishak JCA and *Soh Hoo Hong v. Thor Beng Keat & Or*s [2024] CLJU 231; [2024] 1 LNS 231; [2024] AMEJ 223 at [71], per Azizan Md Arshad JC).

Application To Facts

[71] DBKL's sole witness, Mohamed Fauzi, a maintenance staff from DBKL/SD1, testified that the accident happened because the first plaintiff's motorcycle hit a 'manhole' belonging to Time Dotcom.

(See encl. 4 witness statement Q and A 8 appeal record Part B p. 129). (See also undated DBKL site investigation report signed by Mohamed Fauzi and verified by one Muhammad Anwar bin Othman from DBKL at encl. 5 appeal record Part C pp. 375 and 376).

[72] The investigating officer, Sarjan Che Anuar SP1, testified to the existence of a manhole at the accident location. (See encl. 4 pp. 140 to 141). (See also the rajah kasar at encl. 5 p. 317 states "lokasi kejadian (jalan berlubang)"). SP1 testified that the manhole cover was used to cover a hole for workers to go down and come out when doing work underground. (See encl. 4 p. 141).

[73] The evidence adduced therefore shows that the accident happened due to a manhole owned by Time Dotcom. Since Time Dotcom opted to submit no case to answer and did not call any witnesses to rebut the facts I have set out above and to rebut Sprint's indemnity claim, the appeal by Sprint is allowed with costs.

A **Decisions On Appeal 56 And Cross-appeal, Appeal 60 And Appeal 63**

Decision On Appeal 56 And Cross-Appeal

[74] The appeal by the plaintiffs against DBKL is allowed with costs here and below. The order of the Sessions Court that the plaintiffs pay scale costs
B of RM13,680.45 to DBKL is set aside. DBKL shall pay costs of RM20,000 to the plaintiffs subject to allocatur.

[75] The cross-appeal is dismissed with costs of RM20,000 subject to allocatur. Quantum awarded by Sessions Court is affirmed. Interests as awarded by the Sessions Court as set out in grounds of judgment encl. 7 at
C p. 45 para. 112 is affirmed.

Decision On Appeal 60

[76] I grant order in terms for para. 8(ii), (iii) and (v) of the statement of claim of DBKL against Sprint. The orders of the Sessions Court are set aside.
D Costs to be paid by Sprint to DBKL of RM5,000 subject to allocator.

Decision On Appeal 63

[77] I grant order in terms for para. 8(b), (c), (e) and (f) of the statement of claim of Sprint against Time Dotcom. The orders of the Sessions Court are set aside. Costs to be paid by Time Dotcom to Sprint of RM3,000
E subject to allocatur.

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